

A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd
[2009] NTCA 4

PARTIES: A J LUCAS OPERATIONS PTY LTD

v

MAC-ATTACK EQUIPMENT HIRE
PTY LTD

AND

BRIAN GALLAUGHER

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP 5 of 2009 (20927600)

DELIVERED: 6 November 2009

HEARING DATES: 23 September 2009

JUDGMENT OF: MILDREN, RILEY & SOUTHWOOD JJ

APPEAL FROM: KELLY J

CATCHWORDS:

CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT (NT) – whether the appointed adjudicator made his determination in accordance with the requirements of the adjudication process fixed by the Act – whether adjudicator failed to determine issues raised – whether a valid “payment claim” existed under the contract and within the meaning of the Act to give rise to a “payment dispute” – appeal allowed.

Building and Construction Industry Security of Payment Act 1999 (NSW), s 13(b); *Construction Contracts (Security of Payments) Act* (NT), s 3, s 4(a), s 8, s 8(a), s 10, s 26, s 28, s 28(1), s 28(2), s 28(2)(b), s 28(2)(b)(ii), s 33, s 33(1), s 33(1)(a), s 33(1)(a)(i) to (iv), s 33(1)(a)(ii), s 33(2), s 39(2), s 48(1), s 48(3)

Attorney-General (NSW) v Quin (1990) 170 CLR 1; *Buck v Bavone* (1976) 135 CLR 110; *Marbury v Madison* (1803) 1 Cranch 137; [5 US 87]; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *R v Connell*; *Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *R v Judges of the Federal Court of Australia*; *Ex parte WA National Football League* (1979) 143 CLR 190; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42; followed

Craig v The State of South Australia (1995) 184 CLR 163; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46; *Plaintiff S 157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476; *R v Judges of the Federal Court of Australia*; *Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113; referred to

REPRESENTATION:

Counsel:

Appellant:	A Wyvill
Respondent:	W Roper

Solicitors:

Appellant:	Ward Keller
Respondent:	Hunt & Hunt

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd
[2009] NTCA 4
No AP 5 of 2009 (20927600)

BETWEEN:

A J LUCAS OPERATIONS PTY LTD
Appellant

AND:

**MAC-ATTACK EQUIPMENT HIRE
PTY LTD**
First Respondent

AND:

BRIAN GALLAUGHER
Second Respondent

CORAM: MILDREN, RILEY & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 6 November 2009)

MILDREN J:

- [1] The facts and circumstances relating to this appeal are set out in the judgment of Southwood J and I need not repeat them. What follows are my reasons for allowing this appeal on 23 September 2009 and declaring the decision of the adjudicator void.

- [2] In order for the adjudicator to have jurisdiction to adjudicate a payment dispute, s 28 of the *Construction Contracts (Security of Payments) Act* (the Act) sets out certain criteria which must be met. Relevantly for these purposes, the written application to have the payment dispute adjudicated must be made by serving the written application on the other party to the contract within 90 days after the dispute arises. Subsection 33(1)(a)(ii) of the Act provides that the adjudicator must dismiss the application without making a determination on its merits if the application has not been prepared and served in accordance with s 28.
- [3] Subsection 8(a) of the Act provides that a payment dispute arises if, when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.
- [4] Subsection 4(a) of the Act defines a payment claim to mean a claim under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.
- [5] The adjudicator found that under clause 13 of the construction contract, accounts were to be paid 30 days from the end of the month in which the invoice was received.

- [6] It is common ground that most of the amounts claimed in the application had been previously claimed on invoices that fell due for payment more than 90 days before the service of the application.
- [7] The respondent submitted before the adjudicator that the application was out of time.
- [8] Subsection 28(2)(b) of the Act provides that an application must state the details of or have attached to it any payment claim that has given rise to the payment dispute.
- [9] The application did not have attached to it the original invoices which had been the subject of payment claims which were overdue. What the applicant did was to attach to the application what was described as “a summary of the invoices rendered for the hire of the Equipment and the payments received in respect of those invoices ...” (AB 19-20). The application also referred to a payment claim made under the contract on 1 May 2009 which was allegedly attached to the application. That “payment claim” was not signed as required by the terms of the contract and the first time the appellant had seen it was at the time of service of the application. Importantly, it related to invoices which had previously been sent to the appellant and which were payment claims in themselves, most of which had fallen due for payment more than 90 days before the service of the application.
- [10] The adjudicator decided by reference to a decision of a magistrate in another matter that even though a payment claim had already been made in respect

of a particular amount arising under the contract, there was nothing to stop the service of a second or subsequent payment claim. I doubt whether the decision of the learned Magistrate made any such ruling. The Act, unlike s 13(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW), does not specifically permit a payment claim including an amount that has been the subject of a previous payment claim and does not specifically permit a second or subsequent payment claim for an amount which has already been the subject of a payment claim.

- [11] In my opinion, the Act does not envisage that a payment claim which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28 to be available for adjudication. If the Act intended repeat claims could be adjudicated, it would defeat the purpose of the 90 day time limit. Furthermore, the Act makes no provision for an extension of time except where s 39(2) of the Act applies and it is instructive to see what that provision contemplates.
- [12] Under s 33(2) of the Act, if an application is not dismissed or determined by an adjudicator within the prescribed time, it is taken to be dismissed when the time ends. Section 39(2) provides that in those circumstances, a further application may be made within 28 days. There is no other provision of the Act allowing for a further application in respect of the same payment claim. Furthermore, there is no power given to an adjudicator (or to anyone else) to extend the 90 day time limit.

[13] Section 48(3) of the Act contains a privative clause. Except as provided by s 48(1) (which applies only where the adjudicator dismisses the application under s 33(1)(a)), a decision of an adjudicator cannot be appealed or reviewed. However, given the nature of the tribunal which the Act provides for, this provision does not prevent the Court from declaring that a determination is void for jurisdictional error of a kind where the tribunal wrongly construes the Act.¹ I do not think there is any doubt that the adjudicator cannot assume jurisdiction by an error of law going to his jurisdiction. In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*,² I held that the decision of an adjudicator who wrongly determined whether the 90 day time limit had been complied with, was not void. The Judge below felt constrained to follow what I then said. But that was a case of non-jurisdictional error. In my opinion, an adjudicator cannot wrongly construe the Act on a question going to his jurisdiction to decide the adjudication on the merits.³ As Marshall CJ said in *Marbury v Madison*⁴ in a passage quoted with approval by Brennan J in *Attorney-General (NSW) v Quin*:⁵

“It is, emphatically the province and duty of the judicial department to say what the law is.”

[14] Plainly, the question of whether or not a second payment claim for the same or substantially the same claim is a matter of law going to the adjudicator’s

¹ *Plaintiff S 157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at [57].

² [2008] NTSC 46.

³ *Craig v The State of South Australia* (1995) 184 CLR 163 at 179.

⁴ (1803) 1 Cranch 137 at 177; [5 US 87 at 111].

⁵ (1990) 170 CLR 1 at 35-36.

jurisdiction. He answered it wrongly and, therefore, the appellant was entitled to the declaration sought. Whether any other kind of jurisdictional error would vitiate the decision of an adjudicator is a matter which does not have to be decided in this appeal.

- [15] It was submitted by counsel for the respondent that the error that the adjudicator made was an error as to the interpretation of the contract. I do not agree with this contention. The adjudicator found that the contract between the parties did not specifically preclude the re-submission of an unpaid claim. Whether he was right or wrong about that is irrelevant.

RILEY J:

- [16] I agree that the appeal should be allowed for the reasons expressed by Southwood J. I also agree with Mildren J that s 48(3) of the Act does not prevent the Supreme Court from declaring a determination of an adjudicator void for jurisdictional error where the adjudicator wrongly construed the Act.

SOUTHWOOD J:

Introduction

- [17] On 23 September 2009, the Court of Appeal allowed the appeal in this proceeding and declared the adjudication of the second respondent, which was made under the *Construction Contracts (Security of Payments) Act (NT)* (the Act) on 7 August 2009, void. When the appeal was allowed Mildren J

told the parties that the members of the Court of Appeal would publish their reasons at a later date. Following are my reasons for decision.

The Grounds of Appeal

[18] The appellant relied on two grounds of appeal. The first ground of appeal was that the learned trial Judge erred in concluding that:

1. The second respondent was entitled to consider material provided in the appellant's response to the first respondent's application for an adjudication under the Act when determining whether or not the first respondent's application for an adjudication complied with the requirements of s 28(2)(b)(ii) of the Act.
2. The second respondent did not fall into error in concluding the first respondent's application satisfied s 28(2)(b)(ii) of the Act.
3. Even if the second respondent did make an error in concluding the first respondent's application satisfied s 28(2)(b)(ii) of the Act, the error did not render his decision a nullity.

[19] The second ground of appeal was the learned trial Judge erred in concluding the adjudicator's determination was not rendered a nullity by virtue of the error of law the adjudicator made in finding the first respondent's application for adjudication was made within the time prescribed by s 28(1) of the Act.

The issues

[20] The principal issue in the appeal was as follows: is the second respondent's determination of the adjudication of a payment dispute between the appellant and the first respondent void because he lacked the jurisdiction to

determine the payment dispute on the merits? The resolution of this issue depended upon a resolution of two subsidiary issues. First, must an adjudicator's determination that the criteria specified by s 33(1)(a)(i) to (iv) of the Act are fulfilled, be founded on a correct understanding of the law and in particular a correct interpretation of the underlying statutory provisions? Secondly, did the second respondent misinterpret the provisions of s 8 and s 28 of the Act and thereby make a jurisdictional error of law when he determined the criteria specified in s 33(1)(a)(i) to (iv) of the Act had been fulfilled?

- [21] In my opinion, the answer to both the latter two questions is yes and therefore the second respondent's determination of the payment dispute was void because he lacked the jurisdiction to adjudicate the payment dispute on the merits.

The factual background

- [22] The appellant performed construction works between Wadeye and Ban Ban Springs in the Northern Territory as part of the Bonaparte Gas Pipeline Project. The appellant hired earth moving equipment for the works from the first respondent under a construction contract.
- [23] The second respondent found the relevant construction contract was the appellant's standard plant hire agreement which was executed by the first respondent on 22 September 2008 and by the appellant on 2 October 2008. Clause 13 of the appellant's standard hire agreement stated:

PAYMENT

Accounts shall be rendered at monthly intervals and will be paid 30 days from the end of the month in which the Owner's [the first respondent's] valid Tax Invoice is received. Tax invoices must be accompanied by proof of delivery signed by the Hirer and must contain this Hire Agreement Number. Completed Plant Hire Forms must be completed by the third day of the following month and returned to the Hirer. All Tax Invoices must be duly supported with all relevant daily reports accepted and signed by the Hirer.

- [24] From time to time during the hire of the earth moving equipment under the construction contract, the first respondent rendered invoices to the appellant for the hire of the equipment. Each invoice made a claim for payment of an amount for the performance by the first respondent of its obligations under the construction contract. Some of the first respondent's invoices were not paid by the appellant.
- [25] On 1 May 2009, the first respondent sent the appellant a document which was headed Tax Invoice No 1461. The document provided a summary or accounting in relation to the total amount outstanding under all previously rendered Tax Invoices. The terms for payment of Tax Invoice No 1461 were stated to be seven days. The first respondent's reason for rendering Tax Invoice No 1461 appears to have been to make a demand that the total amount outstanding (under all of the first respondent's unpaid invoices) be paid within seven days.
- [26] Eleven appendices were attached to the document headed Tax Invoice No 1461. Each appendix contained a schedule of payment claims for a

particular piece of equipment or charge for a particular period of time and copies of the supporting invoices, including the unpaid invoices, which had previously been rendered by the first respondent to the appellant for the hire of earth moving equipment under the construction contract.

- [27] On 14 May 2009, the appellant responded to Tax Invoice No 1461 by sending the first respondent Payment Schedule No 8 which disputed the first respondent's claims.
- [28] On 6 July 2009, the first respondent made an application for adjudication of a payment dispute by an adjudicator under the Act. The application had attached to it a document dated 1 May 2009 which was also headed Tax Invoice No 1461, and 11 appendices containing a schedule of payment claims and supporting Tax Invoices. However, the document described as Tax Invoice No 1461, which was attached to the application for adjudication, had not previously been sent to the appellant. It was a different document to the original document which had been sent to the appellant on 1 May 2009. The original document described as Tax Invoice No 1461 was not attached to the application for adjudication.
- [29] On 8 July 2009, the second respondent was appointed as the adjudicator of the payment dispute between the appellant and the first respondent. On 7 August 2009, he determined the adjudication of the payment dispute on the merits. The second respondent determined the adjudicated amount in favour of the first respondent was \$659,041.98 plus interest of \$13,081.53.

Subsection 33(1) of the Act

[30] The determination of the appeal hinged on the construction of s 33(1) of the Act. The subsection states:

(1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a) –

(a) dismiss the application without making a determination of its merits if –

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 28;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied it is not possible to fairly make a determination –

(A) because of the complexity of the matter; or

(B) because the prescribed time or any extension of it is not sufficient for another reason; or

(b) otherwise – determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or to return any security and, if so, determine –

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.

- [31] Subsection 33(1)(a) requires an adjudicator to dismiss an application for adjudication of a payment dispute, without making a determination on the merits, if: the contract with which the application is concerned is not a construction contract; the application has not been prepared in accordance with s 28 of the Act; another person or entity has made an order, judgment or finding about the payment dispute that is the subject of the application; or the adjudicator is satisfied that it is not possible to fairly make a determination because of the complexity of the matter or its likely duration.
- [32] The structure of subsection 33(1) of the Act is such that the jurisdiction of an adjudicator to embark upon the adjudication of an application on the merits depends upon the adjudicator in fact reaching a state of satisfaction that certain prescribed criteria are met.⁶ The prescribed criteria being those set out in s 33(1)(a)(i) to (iv) of the Act. If the criteria are not satisfied, the adjudicator must dismiss the application without making a determination on the merits.⁷ The existence of such a state of satisfaction is a condition precedent to an adjudicator embarking upon a consideration of an application on the merits.
- [33] The statutory criteria set out in s 33(1)(a)(i) to (iv) are of such a nature that the satisfaction of the adjudicator as to whether they have been fulfilled or not must be both reasonable and founded upon a correct understanding of

⁶ *R v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

⁷ s 33(1)(a) of the Act.

the law.⁸ A reasonable and legally correct state of satisfaction is a necessary jurisdictional fact. If such a jurisdictional fact does not exist, an adjudicator would be acting in excess of jurisdiction if he made a determination of an application on the merits.⁹ The adjudicator cannot give himself jurisdiction by erroneously deciding that the fact or event exists.¹⁰

[34] Such a construction of s 33(1) of the Act is based in the first instance upon the text of the section. Subsection 33(1)(a) expressly provides that the adjudicator must dismiss the application without making a determination of its merits if the criteria set out in s 33(1)(a)(i) to (iv) are not fulfilled. The criteria themselves are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. The express purpose of the Act is confined to promoting the security of payments under construction contracts.¹¹ The object of the Act is to be achieved by facilitating timely payments between the parties to construction contracts; providing for the rapid resolution of payment disputes arising under construction contracts; and providing mechanisms for the rapid recovery of payments under construction

⁸ *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; *Buck v Bavone* (1976) 135 CLR 110 at 118 – 119.

⁹ *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 per Gummow J at pars [127] to [140].

¹⁰ *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 per Gummow J at par [127]; *R v Judges of the Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 214.

¹¹ s 3(1) of the Act.

contracts.¹² The object of the adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible.¹³

[35] As I previously stated in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* the jurisdiction granted to adjudicators to determine applications under the Act is a specific and limited jurisdiction.¹⁴ The Act is essentially aimed at maintaining a contractor's or subcontractor's cash flow during the course of a construction contract. For an adjudicator's determination to be valid, all essential requirements of the adjudication process must be fulfilled.¹⁵

The underlying provisions of the Act

[36] Section 28 of the Act states:

(1) To apply to have a payment dispute adjudicated, a party to the contract must, within 90 days after the dispute arises or, if applicable, within the period provided for by section 39(2)(b) –

(a) prepare a written application for adjudication;

(b) serve it on each other party to the contract;

(c) serve it on –

(i) if the parties to the contract have appointed a registered adjudicator and that adjudicator consents – the adjudicator;

¹² s 3(2) of the Act.

¹³ s 26 of the Act.

¹⁴ [2008] NTSC 42 at par [57].

¹⁵ *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42 at par [42].

(ii) if the parties to the contract have appointed a prescribed appointer – the appointer; or

(iii) otherwise – a prescribed appointer chosen by the party; and

(d) provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under section 46(7) or (8).

(2) The application must –

(a) be prepared in accordance with, and contain the information prescribed by, the Regulations;

(b) state the details of or have attached to it –

(i) the construction contract involved or relevant extracts of it; and

(ii) any payment claim that has given rise to the payment dispute; and

(c) state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication.

(3) Subsection (1) applies to a dispute even if it arises within the 90 day period immediately preceding the commencement of this subsection.

[37] Subsection 28(1) requires a party who wishes to make an application for an adjudication to prepare a written application and serve it on the other parties to the contract within ninety days after a payment dispute arises. A payment dispute arises if the amount claimed in a payment claim is rejected, wholly

or partly disputed or not paid in full when it is due to be paid under the relevant construction contract.

[38] Relevantly to this appeal, s 8(a) of the Act states:

A payment dispute arises if –

(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed;

[39] Section 8 of the Act specifies the time when a payment dispute arises. The time when a payment dispute arises cannot be deferred or retriggered by the inclusion in a construction contract of clauses which make provision for the resubmission or reformulation of a payment claim. Section 8 of the Act does not contemplate the re-triggering of a payment dispute by the resubmission or reformulation of payment claims. The section makes no provision for repeat payment claims.

[40] Section 10 of the Act states:

(1) A provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.

[41] Subsection 28(2) requires the party filing an application to either: state the details of the construction contract in the application or attach the construction contract to the application; and either state the details of the payment claim that has given rise to the payment dispute or attach the payment claim that has given rise to the payment dispute.

[42] So far as is relevant to this proceeding, a payment claim means a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.¹⁶

The errors made by the second respondent

[43] In the course of determining that the criteria prescribed by s 33(1)(a)(i) to (iv) of the Act had been fulfilled and he had jurisdiction to determine the payment dispute on the merits, the second respondent made the following findings: (1) while the first respondent did not attach the relevant payment claim to the application, the second document described as Tax Invoice No 1461 provided details of the relevant payment claim; (2) the relevant payment claim was the claim made in the original document described as Tax Invoice No 1461; (3) the payment claim was disputed by the appellant on or about 14 May 2009 when the appellant sent Payment Schedule No 8 to the first respondent, Payment Schedule No 8 served as a notice of dispute; (4) the application had been made within the time stipulated by s 28(1) of

¹⁶ s 4 of the Act.

the Act; and (5) the construction contract did not prevent the applicant from making more than one payment claim in respect of the same payment item.

[44] Each of the five findings is an error of law which involves a misinterpretation of the relevant provisions of the Act.

[45] As to the first finding, the relevant payment claims were each of the original tax invoices rendered by the first respondent from time to time during the hire of the earthmoving equipment and either rejected, partly disputed, disputed, partly unpaid or unpaid by the appellant. The original invoices were payment claims made under the construction contract and they are the payment claims which gave rise to the payment disputes. They are the payment claims to which s 8 of the Act refers. The document described as Tax Invoice No 1461 which was attached to the application did not describe those payment claims. Instead, that document reformulated the first respondent's payment claim for the total amount outstanding under all previously rendered invoices. It made a repeat claim for payment for the performance of obligations under the construction contract which had already been invoiced. The application did not comply with the requirements of s 28(2)(b)(ii) of the Act.

[46] As to the second finding, the relevant payment claim was not the claim made in the original document described as Tax Invoice No 1461. That document is not a document contemplated by Clause 13 of the appellant's standard hire agreement and it is not a document which falls within the definition of

“payment claim” under the Act. It did not give rise to a payment dispute under s 8 of the Act. Rather, each of the unpaid or partly paid invoices rendered during the hire of the earth moving equipment gave rise to a payment dispute. The original document described as Tax Invoice No 1461 was a repeat claim for the total amount outstanding under previously rendered invoices or payment claims in respect of which there was already a payment dispute.

[47] As to the third finding, the payment claims were disputed when each of the relevant original invoices rendered during the course of the hire of the earthmoving equipment remained either rejected, partly disputed, disputed, partly unpaid or unpaid by the appellant when they fell due for payment under the construction contract. They were not disputed by the appellant under s 8 of the Act on or about 14 May 2009 when the appellant sent Payment Schedule No 8 to the first respondent. At the latest, the payment disputes arose when the relevant invoices fell due for payment under the contract and were not paid or were partly paid.

[48] As to the fourth finding, the application was not made within the time stipulated by s 28(1) of the Act. Time ran in relation to each original invoice if the invoice was either rejected, disputed or partly disputed, partly unpaid or unpaid when the amount invoiced was due for payment under the construction contract. An application for adjudication with respect to some of the later unpaid original invoices rendered by the first respondent may have been prepared within time if such an application was prepared at the

time the application was prepared in this proceeding. However, the first respondent elected not to make such an application.

[49] As to the fifth finding, the construction contract did not enable the first respondent to make repeat payment claims in respect of the performance of the same obligations under the construction contract. Clause 13 of the appellant's standard hire agreement provides for the rendering of accounts at monthly intervals and for the payment of accounts within 30 days from the end of the month in which a valid Tax Invoice is received. The clause contains no express provision for the making of repeat claims and there is no basis for implying such a provision in the standard hire agreement. Further, s 8 of the Act does not permit a payment dispute to be retriggered by the making of a repeat payment claim in respect of the performance of the same obligations under a construction contract.

[50] In the circumstances, the first respondent's application was not prepared and served within the time prescribed by s 28(1) of the Act and the application did not comply with the requirements of s 28(2)(b)(ii) of the Act. The criterion specified by s 33(1)(a)(ii) of the Act was not fulfilled and the second respondent lacked the jurisdiction to determine the payment dispute between the appellant and the first respondent on the merits. The first respondent should have made an application for adjudication of each unpaid or partly paid invoice after it fell due for payment under the construction contract.

[51] I agree with Mildren J that s 48(3) of the Act does not prevent the Supreme Court from declaring that a determination of an adjudicator is void for jurisdictional error of a kind where the adjudicator wrongly construes the Act.
